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No. 244

In The
Supreme Court of the United States
OCTOBER TERM, 1950

AMERICAN FIDELITY & CASUALTY COMPANY, INC.
a corporation,
Petitioner,

VERSUS

ALL AMERICAN BUS LINES, INC., and SECURITY MUTUAL CASUALTY COMPANY, a corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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AUGUST, 1951.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to reverse the Judgment of the United States Court of Appeals for the Tenth Circuit entered on the 13th day of July, 1951.

OPINIONS BELOW

There have been two appeals to the Circuit Court of Appeals. Herein pages to first record on appeal will be referred to as (1-R) and pages of the second record as (2-R). The trial court entered judgment in favor of the respondent All American Bus Company, Inc., on December 3, 1948 (1-R 28-29) which is unreported. The United States Court of Appeals for the Tenth Circuit reversed such judgment, 179 F. 2d 7. On September 13, 1950, pursuant to the Mandate of the Circuit Court the trial court dismissed the cause as to the respondent All American Bus Lines, Inc., and directed a substitution of the respondent Security Mutual Casualty Company as party plaintiff (2-R. 5-6). On September 30, 1950, the trial court entered judgment in favor of the respondent Security Mutual Casualty Company (2-R. 30-31), which is unreported. The Court of Appeals for the Tenth Circuit affirmed the judgment of the trial court (2-R. 41-47), which judgment is part of the printed record but has not yet been officially reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 23, 1951 (2-R 47). A Petition for Rehearing filed on July 9, 1951 was denied on July 13, 1951 (2-R 49). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

SPECIFICATIONS OF ERROR AND QUESTIONS PRESENTED

SPECIFICATION I

This litigation presents a question of vital public importance not only to the litigants involved but to all casualty insurance companies and to every person who purchases casualty insurance.

SPECIFICATION II

The litigation involves a legal question of first impression, thereby making desirable an early and definitive ruling by the Supreme Court.

SPECIFICATION III

A conflict exists between the decisions of five Circuits, to-wit: (Tenth) this case, also American Fidelity & Casualty Co. v. G. A. Nichols Co., 173 F. 2d 830; (Seventh) Royal Transit v. Central Surety & Ins. Corporation, 168 F. 2d 345; (Sixth) Noshey v. American Automobile Insurance Co., 68 F. 2d 808; (Fifth) American Mutual Liability Insurance Co. v. Cooper, 61 F. 2d 446; (Fourth) American Casualty Company of Reading, Pa. v. Howard, 187 F. 2d 322. The Supreme Court of the United States has not passed upon the legal questions involved herein.

SPECIFICATION IV

Petitioner's constitutional right to a jury trial was denied by the trial court.

STATEMENT OF THE CASE

Petitioner, American Fidelity & Casualty Co., Inc. (hereinafter referred to as "American"), is a *primary* insurance company. Respondent, Security Mutual Casualty Co. (hereinafter referred to as "Security"), is an *excess* insurance company. Respondent, All American Bus Lines, Inc. (hereinafter referred to as "Bus Company"), is a motor passenger carrier. American and Security both wrote policies of insurance, insuring the operations of the Bus Company. American's policy was for $10,000 primary coverage (1-R 5-8). Security's policy was for an additional $90,000 excess coverage (1-R 115-116) also (2-R 20-29). An accident occurred as a result of the operation of a bus by the Bus Company. The claim presented was of a sufficient amount as to involve the insurance coverage of both the American and Security (1-R 121-125). An opportunity was presented to settle the claim for an amount within the policy coverage of American, which the American declined to do (1-R. 64). The jury returned a verdict for more than American's coverage (1-R. 114). In settlement of the judgment American paid $10,000 and Security paid $7,500 (1-R. 113-114). It is admitted that the Bus Company paid premiums to both American and Security for the insurance coverage represented in their respective policies (1-R. 88).

The Bus Company sued American contending that it was guilty of "bad faith" and "negligence" in refusing

to settle the loss for an amount within its policy coverage (1-R. 1-18). The Circuit Court held that as the Bus Company had sustained no loss it was not the proper party in interest to prosecute the action (2-R. 43) 179 F. 2d 7. Security was substituted as a party plaintiff in the trial court (2-R. 6). Security contends that under the subrogation clause of its policy it is entitled to step into the shoes of the Bus Company, charge American with bad faith in refusing to settle the claim within its policy coverage and recoup its loss from American (2-R. 3-4).

In defense American contends that Security not being a party to the policy contract, is not entitled to sue American for its alleged breach of contract in declining to settle the loss. American contends further that it was not guilty of bad faith or negligence in declining to settle the claim (2-R. 7-29). The trial court entered judgment in favor of Security and against American, which judgment was affirmed by the Court of Appeals for the Tenth Circuit (2-R. 47), not yet officially reported, which is the judgment involved in the present proceedings.

REASONS FOR ALLOWANCE OF WRIT

The insurance business is a nation wide industry. Policies written in one State "concern people living far beyond the boundaries" of the State in which the policy is written. Mr. Justice Black, in the case of *U. S.* v. *Southeastern Underwriters Association*, 322 U.S. 533,

540, 88 L. ed. 1440, 64 S. Ct. 1162, very aptly comments:

> "Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or business of almost every person in the United States."

The instant case is of vital concern, not only to the parties litigant but to all casualty insurance companies in the United States and every purchaser of a casualty insurance policy.

The instant case involves an interpretation of the "defense clause" of a standard public liability insurance policy. Under this provision an insurance company is required to "defend" in the name of the policyholder and on his behalf "any suit against the insured * * * seeking damages, etc."

There is considerable lack of uniformity among the courts of the various circuits in defining the duties owed by an insurance company to the policyholder under the defense clause of its standard policy. The instant case holds that the relationship between the policyholder and the insurance company is a fiduciary relationship and that the insurance company in considering the advisability of making a settlement for an amount within the policy coverage must act in "good faith" towards the policyholder.

The vital point which distinguishes the instant case from all other cases and causes the case to be of public concern is the salient fact that there is involved herein not a controversy between the policyholder and insurance company but a controversy between an excess insurance company and a primary insurance company.

In this case the policyholder, the Bus Cmpany, sustained no loss. The Bus Company bought and paid for full insurance protection both for himself and the traveling public. In paying the loss, the primary insurance company, American, paid the maximum amount it owed under its policy, or $10,000. The excess insurance company, Security, paid $7,500. Each insurance company had collected premiums from the Bus Company for the insurance coverage afforded. Each insurance company owed the policyholder the duty of furnishing a good faith defense. After the Security paid what it was required to pay under its excess policy, it now seeks to be unjustly enriched and recoup its loss for which it was paid a premium by suing the primary insurance company, American, which paid out the maximum limits of its policy. The Security is not satisfied with collecting a premium for the loss it sustained. It wants to collect the premium, retain it and not pay the loss. The question therefore becomes of vital importance, not only to the litigants involved but to all insurance companies writing public liability coverage.

At present there are approximately three hundred and eighty-seven insurance companies in the United States engaged in the business of writing casualty insurance (Spectator Handy Chart, 1951). A considerable number of these companies write public liability insurance covering motor vehicles for policyholders who also carry excess insurance policies. The decision in the instant case vitally affects the business of each casualty insurance company writing this type of coverage.

This is a case of first impression for any court. A new course is being charted which will guide the insurance world in the future conduct of its business. May the course be true. The writer has searched diligently for a precedent but has been unrewarded. He is reminded of the words of the great advocate Rufus Choate, who was asked for a precedent when arguing a case before this distinguished body. He replied: "I will look, Your Honor, for a precedent, although it would be a pity that this court should lose the honor of being the first to establish so just a rule."

There are several cases in the recorded reports, which will be hereinafter discussed, denying the right of one insurance company to seek contribution from a second insurance company for a loss the first company was required to pay under its policy and for which it had been paid a premium.

The foundation for the present lawsuit brought by the excess insurance company is unsound. It is built on sand and not on rock. The excess company was not a party to the insurance contract entered into between the primary insurance company and the policyholder. Under the terms of its policy the primary inusrance company obligated itself to properly defend the policyholder. This was a personal duty it owed the policyholder. For this obligation the primary insurance company received due compensation in the nature of a policy premium. It owed no duty to the excess insurance company, contractual or otherwise. It collected no premium or compensation for paying a loss sustained by the excess insurance company. There was no privity of contract between the primary insurance company and the excess insurance company. The excess insurance company likewise contracted to perform certain obligations for the policyholder. It contracted to pay all losses occasioned by reason of the Bus Company's operation when the amount of the loss was in excess of the $10,000 primary coverage furnished by the primary carrier. For the performance of this duty the excess company collected a premium. The excess insurance company should not be permitted to "have its cake and eat it too." Common decency requires that the excess insurance company be compelled to pay its own debts and not welch about the matter. It is axiomatic that one individual shall not be unjustly enriched at the expense of another.

If the decision of the Circuit Court is permitted to stand, then an excess insurance company need never pay a loss. Their business should be prosperous. In the case of excess insurance there is always primary insurance. Let us visualize the situation which would arise if the present decision is permitted to stand. A claim arises which involves more than the coverage of the primary carrier. An offer of settlement is received within the coverage of the primary carrier. The primary carrier in good faith declines to accept the offer of settlement. The policyholder makes no complaint for he has quite properly provided himself with adequate insurance coverage. The judgment on the claim is of sufficient size as to require the excess company to pay a portion of the judgment. It does so, but then sues the primary carrier for the purpose of recouping its loss. Is that fair? Is this equity? Or is this unjust enrichment by one at the expense of another? Such an interpretation emasculates the provisions of insurance contracts. The present decision is being carefully watched by the insurance world. It concerns the insurance business generally and also the cost of insurance to the purchasing public. The instant case presents a siutation wherein a grave injustice has been done which justifies the issuance of the writ.

> "There is no room for the application of the subrogation clause between the insurers."
>
> *Keener* v. *Indemnity Co.*, 320 Mass. 6, 67 N.E. 769.

"The right of subrogation does not obtain in favor of one discharging debt in performance of his own obligation."

Amick v. *Columbia Casualty Co.* (C.C.A. 8), 101 F. 2d 984;
American Surety Co. of New York v. *Bank of California* (D.C., Ore.), 44 F. Supp. 81;
William Burford & Co. v. *Glasgow Water Co.*, 223 Ky. 54, 2 S.W. 2d 1027.

The doctrine of subrogation invests an insurance company with certain rights but "not with the right to override its own obligation to the assured."

Great Lakes T. Corporation v. *Interstate S.S. Co.*, 301 U.S. 646, 57 S. Ct. 915, 81 L. ed. 1318.

"One who engages in the business of insurance for compensation may properly be held more rigidly to his own obligation."

Chapman v. *Hogue*, 296 U.S 526, 56 S. Ct. 333, 80 L. ed. 370.

"This right (the right of subrogation) does not entitle an insurance company which has paid the loss to be subrogated to insured's claim against another insurer."

C.J.S., Vol. 46, pp. 177, 178, Par. 1211.

No privity of contract exists between several insurance companies paying their proportionate part of a loss, and no right of contribution or subrogation exists between them.

Continental Casualty Co. v. *Curtis Publishing Co.* (C.C.A. 3), 94 F. 2d 710;

Southern Surety Co. v. *Commercial Casualty Insurance Co.* (C.C.A. 3), 31 F. 2d 817;
American Casualty Co. v. *Maryland Casualty Co.* (D.C., Pa.), 20 F. Supp. 561;
Fidelity & Casualty Co. of New York v. *Firemen's Fund Indemnity Co.*, 38 Cal. App. 2d 1, 100 P. 2d 364.

An insurance company is not entitled to charge another insurance company with bad faith for its refusal to settle a claim within its policy coverage.

Traders & General Insurance Co. v. *Hicks Rubber Co.*, 140 Tex. 586, 169 S.W. 2d 142.

The legal question presented herein is of vital importance to the insurance buying public, for after all the purchaser in the final analysis pays the bill. Any judicial decision which broadens the provisions of an insurance contract has a corresponding effect on the cost of the insurance to the purchaser. Sometimes it is necessary to broaden the provisions of a policy in order to furnish complete protection for the policyholder, but when the exposure of the insurance company is increased it logically follows that the premium must be larger. Candidly but sincerely I say that if primary carriers are required to assume the obligation of excess insurance companies, then their exposure is increased and they are entitled to more premium. In the instant case the Bus Company paid the primary insurance company a certain premium for per-

forming its policy obligations to the Bus Company. The Bus Company also paid the excess carrier for the coverage afforded by its policy. Insurance rates and premiums are based entirely on the hazard and risk incurred and the amount of insurance coverage. If the decision of the Circuit Court becomes final it is logical to assume that casualty insurance will cost the purchasing public many thousands of dollars more during the next several years. This is entirely unnecessary. Each company should pay its own debts and reduce the cost to the public to a minimum. The public is vitally concerned with the effect of the present decision.

There is some conflict in the principles of law enunciated by the various Circuits. As the insurance business is a nationwide industry, uniformity in the interpretation of policy provisions becomes important. This is particularly true in the case of policies covering motor vehicles. Motor vehicles travel throughout the nation. In this particular instance the bus lines of the Bus Company traversed some ten or twelve States. Litigation involving the interpretation of policy contracts frequently reaches the Federal courts because of a diversity of citizenship of the parties. Policy provisions are practically uniform. Uniformity in interpretation is essential to avoid confusion. The obligation of an insurance company to a policyholder under the defense clause of its policy should be the same in every jurisdiction. A policyholder starts

out on an automobile trip. He is entitled to the security of knowing that he has the same defense under his policy in every State he enters. The Supreme Court of the United States has not passed upon the questions involved in the present litigation. There is a lack of harmony among the decisions of the various circuits. Under Specification III the decisions of five circuits are listed. The most recent case cited is the case of *American Casualty Co. of Reading, Pa.* v. *Howard,* 187 F. 2d 322, wherein the Fourth Circuit held that in determining the advisability of settling a claim within the policy coverage an insurance lawyer was not required to be a prophet but must act reasonably and in good faith. The decision of the Fourth Circuit appears to be in conflict with the present case decided by the Tenth Circuit; also the case of *American Fidelity & Casualty Co. G. A. Nic*l*ls* (C.C.A. 10), 173 F. 2d 830, wherein the Tenth Circuit held the relationship between the insurance company and the policyholder to be in the nature of a fiduciary relationship requiring the exercise of the utmost good faith on the part of the representatives of the insurance company.

The Circuits are in decided conflict over the definition to be applied to the words "good faith." In order to avoid confusion an early definitive ruling of the Supreme Court of the United States for the guidance of the Federal courts is advisable. This being a case of first impression, an opportunity is presented to clarify the conflicting theories presented in the decisions of the various Circuits.

The decision of the Circuit Court in the instance case is erroneous on the question of the good faith required of an insurance company in declining to settle a claim within its policy coverage. American, the primary carrier, owed no duty to Security, the excess insurance company, to settle the claim in question for any amount. In fact the primary insurance company, American, did not know of the existence of the excess insurance policy (1-R. 56-91). The Bus Company made no demand upon the primary insurance company to settle the claim (1-R. 88-89). The Bus Company's manager appeared at the trial of the case but did not seem to be worried and left the courthouse before the jury returned its verdict (1-R. 55). The excess insurance company did not seem to be concerned and made no demand upon the primary insurance company to settle the claim (1-R. 88, 89, 91). I cannot be charged with bad faith if no one is criticizing my actions. How can an individual or a company be charged with bad faith in pursuing a certain course of conduct if no one is criticizing the course of conduct pursued? Good faith or bad faith have been defined as a "state of mind." *Johnson* v. *Hardware Mutual Casualty Co.*, 109 Vt. 481, 1 A. 2d 817. Bad faith connotes the idea of something reckless or malicious being done. Mistakes of judgment do not constitute bad faith.

American Casualty Company of Reading, Pa. v. *Howard* (C.C.A. 10), 187 F. 2d 322;
Noshey v. *American Automobile Insurance Co.* (C.C.A. 6), 68 F. 2d 808.

"The gift of prophecy has never been bestowed upon ordinary mortals."

Burham v. *Commercial Casualty Co.*, 10 Wash. 2d 624, 117 P. 2d 644.

"Hindsight sometimes turns out better than foresight."

Wynnewood Lumber Co. v. *Travelers Insurance Co.*, 173 N.C. 269, 91 S.E. 946.

Some years ago a distinguished statesman was asked to write a few words in the memory book of a high school senior. He penned the words "Be genuine." Be genuine and honest and that is all that is necessary. This case presents a situation wherein an injustice has been done justifying the issuance of the writ.

Under Specification IV petitioner presents the error of the trial court in refusing to grant the petitioner a jury trial. This presents an unusual situation. The right to a jury trial is guaranteed by the Constitution of the United States. Amendment Seven and Amendment Fourteen to the Constitution of the United States, U.S.C., Vol. 3, Page 379, Vol. 4, Page 2.

The instant case was originally filed by the respondent, Bus Company (1-R. 1-18). A judgment was en-

tered in favor of the Bus Company (1-R. 28-29). The Circuit Court reversed such judgment holding that as the Bus Company had sustained no loss it was not the proper party in interest. *American Fidelity & Casualty Co.* v. *All American Bus Lines* (C.C.A. 10), 179 F. 2d 7. After the case was remanded to the trial court the excess insurance company filed an application to be substituted as party plaintiff (2-R. 1-2). Petitioner, American, objected to such substitution, contending that the excess insurance company, Security, was not one of the parties designated in Rule 25 of the Federal Rules of Civil Procedure governing the right of substitution. Petitioner's objections were overruled and the substitution permitted (2-R. 6). Within a period of ten days under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure the petitioner, American, filed a responsive pleading to the complaint as amended by the substitution of the excess insurance company, Security, as party plaintiff (2-R. 7-29). On the same date, under Rule 38 of the Federal Rules of Civil Procedure, the petitioner, American, filed its written demand for jury trial (2-R. 29-30). The trial court denied the demand of the petitioner for a jury trial, granted no additional hearing of the case and summarily entered judgment in favor of the excess insurance company, Security (2-R. 30-31). In doing so the trial court erroneously construed the provisions of Rules 15(a), 25 and 38 of the Federal Rules of Civil

Procedure. Petitioner's constitutional right to a jury trial was denied. The decision of the Circuit Court affirms the ruling of the trial court. For this additional reason the Writ should issue.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

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BRIEF OF RESPONDENTS

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The petitioner at page 4 of its brief, has made a fair statement of this case. We desire, however, to add that this action from its inception, has been predicated upon the bad faith of the defendant, American, in its refusal to settle a damage case in the State Court, which had been filed against the insured, the Bus Company. Voluminous evidence was introduced in the first trial of this case in

the United States District Court for the Western District of Oklahoma (1 R. 48-103) showing the lack of preparedness of American in investigating said damage case; lack of preparedness for the trial; failure to procure any medical testimony as to the nature of the personal injury; and the refusal to settle for $5,000.00, on the morning of the trial, when it was known that this was a dangerous case. The attorney who was defending that action advised that the settlement be made, and the American, in the face of its unpreparedness refused to settle, and demanded that the trial proceed (1 R. 69).

Said damage suit in the State Court resulted in a verdict and judgment for the sum of $25,000.00. The case was thereafter compromised and settled for $17,500.00. The primary insurance company, the American, which carried the liability insurance to the extent of $10,000.00, paid the sum of $10,000.00, and the excess insurance company, the Security, which carried the liability insurance from $10,000.00 to $100,000.00, paid the balance in the sum of $7,500.00.

After the payment of said sums, this action was filed in said Federal Court against the American for the recovery of said sum of $7,500.00 which it had been compelled to pay, by reason of the bad faith of the American in its refusal to settle for the sum of $5,000.00.

In this action a jury trial was waived, and the case was tried to the Court. At the conclusion of the first trial herein, the Court found (1 R. 104):

> "In this case the company is guilty under the facts in this case of the grossest kind of negligence in the

investigation and defense of this claim. They are guilty of bad faith in not settling the claim at a time when they found they hadn't prepared for trial and they were at the Court House ready to try it."

Judgment was thereupon rendered against the American for the sum of $7,500.00, the amount sued for. Throughout this action, it has been maintained for the benefit of Security, the excess insurance company. In the first trial, however, the Bus Company was named as plaintiff. This was done on the theory that a tort action is non-assignable. Judgment was accordingly rendered in the first trial in favor of the Bus Company, and against the American for the sum of $7,500.00. The case was thereupon appealed to the Tenth Circuit, and was there reversed on the ground that the Security was the real party in interest, and therefore should have been named as plaintiff. It appears that theretofore there had been some uncertainty and some controversy in this class of cases as to who should be made party plaintiff. The Tenth Circuit, as its chief authority for such reversal, cited the recent case of *United States* v. *Aetna Casualty & Security Co. et al.*, 70 Sup. Ct. 207, 215, which held that in a case of this character, the insurer, and not the insured, is the real party in interest and must be named as plaintiff.

In accordance with said holding, on the second trial, the Security was substituted as plaintiff instead of the Bus Company. Judgment was rendered in the second trial in favor of the Security and against the American for $7,500.00, which judgment was affirmed by the Court of Appeals for the Tenth Circuit, and now reported in 190 Fed. (2d) 234.

ARGUMENT

The American now files in this Court its petition asking for a Writ of Certiorari. In our opposing brief to the brief of the petitioner, we desire to follow the same argument and in the same order presented by the petitioner.

Specification I.

In Specification I, the petitioner says that this litigation presents a question of vital public importance to the litigants, to casualty insurance companies, and to persons who purchase casualty insurance. We agree that this litigation, as well as all litigation, is important, but we do not see that this importance is any more vital than the ordinary run of litigation. It is pointed out that the insurance business is a nation-wide industry and touches persons in all walks of life. With this we also agree. But the fact that insurance business is important, does not appear to be a sufficient reason to invoke the extraordinary remedy of a Writ of Certiorari.

Specification II.

In Specification II, the petitioner says that this case involves a legal question of first impressions, and that is a case of first impressions for any court. The petitioner then argues, beginning at page 8 of its brief, that there are several reported cases holding that one insurance company cannot seek contribution from a second. This is perhaps true where the defendant company has acted in good faith, and has not been guilty of any tortious conduct. From this the petitioner argues that the decision in this case is un-

sound, and contrary to the established law. This conclusion of the petitioner appears to be based upon the supposition that it acted in good faith, whereas the evidence shows that the American did not act in good faith, but that it acted in the utmost bad faith.

Under its Specification II, the petitioner also argues that the excess insurance company, the Security, was not a party to the contract between the primary insurance company and the policy holder; that there was no privity of contract between the excess insurance company and the primary insurance carrier. From this the petitioner argues that there could be no liability in this case, because of the lack of privity. For the purpose of this argument the petitioner appears again to be assuming that the primary insurance carrier acted in good faith. On page 10 of its brief, the petitioner says: "The primary carrier in good faith declines to accept the offered settlement." This Specification II appears to be based upon the assumption of the petitioner that it acted in good faith. This is a false assumption and furthermore a question of fact, which has been judicially decided against the petitioner.

The question of good faith was one of the chief questions of fact in the trial court. We understand that a detailed statement of the evidence showing such bad faith would not be proper at this time. But the original record filed herein, shows the evidence constituting such bad faith. The findings of the trial court (1 R. 104) are to the effect that the American was guilty of bad faith. It is by reason of this negligence and bad faith that the excess insurance company, the Security, was compelled to pay to the Bus

Company, the policy holder, the sum of $7,500.00, which it would not have been called upon to pay if the primary insurance company, the American, had not exercised bad faith.

This action was brought for the purpose of recovering the $7,500.00 from the primary insurer on account of its tortious conduct, negligence and bad faith. On this matter, and in this case, the Tenth Circuit, on the first appeal held on December 28, 1949, reported in 179 Fed. (2d) 7, as follows:

> "Ordinarily when a public liability insurance company fully reimburses its insured for losses within the coverage of the policy, it becomes subrogated to the rights of the insured against third parties whose tortious conduct caused the loss."

Said decision further held that the excess insurance carrier became subrogated to the rights of the policy holder. In this connection the Court in said opinion said:

> "Under modern statutes abolishing the distinction between law and equity, and requiring that actions be brought in the name of the real party in interest, it is generally held that an insured who had been paid in full by his insurer is not the real party in interest, and is not entitled to bring an action in his own name against the third party tort feasor. Instead the action must be brought by the insurer who by virtue of subrogation becomes the only party in interest. In a very recent case involving the application of Rule 17(a) to tort claims litigation, the Supreme Court said 'if the subrogee is paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name,' citing 3 Moore, Federal Practice

(2d ed.), p. 1339. *United States* v. *Aetna Casualty & Surety Co. et al.*, 1949, 70 S. Ct. 207, 215."

The petitioner on pages 10-12 of its brief now argues that the law of subrogation has no place in this suit. In the cases cited by the petitioner on the question of subrogation, the question of bad faith was not involved, and they have no application to the case at bar. We agree that if there had been no bad faith, there would be no liability against the American, the petitioner herein.

Specification III.

In Specification III, the petitioner says that a conflict exists between the decisions of five circuits, to-wit: the Tenth Circuit, the Seventh Circuit, the Sixth Circuit, the Fifth Circuit, and the Fourth Circuit.

The above Specification III might be an important criticism, if true. But from a careful reading and analysis of all the cases cited under this specification, we submit that there is no conflict, or even inconsistency in said decisions. An analysis of the cases cited under this specification, covering the above five circuits, disclose the following:

TENTH CIRCUIT: In *American Fidelity & Casualty Co., Inc.* v. *G. A. Nichols Co.* (Tenth Circuit), 173 Fed. (2d) 830, suit was brought against G. A. Nichols Co. for damages received by a passenger on the bus of the Nichols Company. The American Fidelity and Casualty Company was the liability insurance carrier, and elected to defend the action. An offer was made to settle for the sum of $10,000.00, the amount of the insurance. The insurance company declined the offer, and judgment was recovered against the

Nichols Company for $22,360.00. While pending on appeal, the case was settled for $15,500.00. The insurance company paid $10,000.00, and the Nichols Company paid the balance of $5,500.00. The Nichols Company thereupon sued the insurance company for the recovery of the $5,500.00 paid by it, and raised the question of bad faith in refusing to make a settlement. As stated by the Court:

> "The issue of whether the Casualty Company acted in bad faith in refusing to accept the offer of settlement was submitted to the jury in the instant case by a special interrogatory and under proper instructions. The jury answered in the affirmative."

As to the law, under such conduct of bad faith, the Court stated the following:

> "When a liability insurance company by the terms of its policy obtains from the insured a power, irrevocable during the continuance of its liability under the policy, to determine whether an offer of compromise of a claim shall be accepted or rejected, it creates a fiduciary relationship between it and the insured with the resulting duties that grow out of such relationship. Under policies like those here involved, the insurer and the insured owe to each other the duty to exercise the utmost good faith. While the insurance company, in determining whether to accept or reject an offer of compromise, may properly give consideration to its own interests, it must, in good faith, give at least equal consideration to the interests of the insured and if it fails so to do it acts in bad faith."

SEVENTH CIRCUIT: In *Royal Transit, Inc.* v. *Central Surety & Ins. Corporation* (Seventh Circuit), 168 Fed. (2d) 345, an action for damages was brought against the Royal

Transit, Inc., for damages for personal injury, and judgment was rendered against it for $62,500.00. The Central Surety & Ins. Corporation carried liability insurance for the Royal Transit, Inc., to the extent of $45,000.00. The Royal Transit, Inc., thereupon sued the insurance company for the difference between the amount of the judgment and the coverage of the policy, predicated upon the bad faith of the insurance company in refusing to settle the action. The trial court found that the insurance company had been guilty of bad faith, and rendered judgment against the insurance company. Upon appeal the judgment was affirmed. In its opinion the Court said:

> "In our judgment, the record discloses that his refusal to discharge this obligation was arbitrary, capricious and without any rational basis, and certainly the finding of bad faith is amply supported. As the court stated in *Traders & General Ins. Co.* v. *Rudco Oil & Gas Co.*, 10 Cir., 129 F. 2d 621, 627, 142 A. L. R. 799, with reference to a similar situation:
>
> " 'Exclusive authority to act does not necessarily mean the right to act arbitrarily. * * * The right to control the litigation in all of its aspects carries with it the correlative duty to exercise dilligence, intelligence, good faith, honest and conscientious fidelity to the common interest of the parties'."

SIXTH CIRCUIT: In *Noshey et al.* v. *American Automobile Ins. Co.* (Sixth Circuit), 68 Fed. (2d) 808, the law as announced in paragraph two of the syllabus, is as follows:

> "Liability insurer, which reserved right to settle or defend suits brought against insured, may become liable to insured for entire judgment recovered against

insured, though exceeding policy amount, on theory of bad faith toward insured in settlement negotiations, but not on theory of negligence or breach of implied contract."

FIFTH CIRCUIT: In *American Mut. Liability Ins. Co. of Boston, Mass.* v. *Cooper* (Fifth Circuit), 61 Fed. (2d) 446, judgment was rendered in favor of Mrs. Auman against the plaintiff, Cooper, for the sum of $13,500.00 growing out of an automobile accident. Cooper had a $5,000.00 liability insurance policy with the defendant insurance company. At one time Mrs. Auman offered to settle for $3,000.00. This was rejected by the insurance company. Just before the case was finally submitted to the jury, Mrs. Auman's attorney agreed to settle for $4,500.00. This was also refused. The insurance company paid $5,000.00, and Cooper brought suit against the insurance company for the balance on the theory of bad faith on the part of the insurance company. Under paragraph three of the syllabus, is the following statement as to the facts:

"The evidence disclosed that the insurer failed to interview witnesses, or to make any effort to determine whether there was any liability upon the claim, and did not attempt to acquaint itself with the extent of injuries on which claim was based, and that it ignored advice of its counsel to settle the case before trial; that it rejected offer of settlement before suit, and finally rejected reasonable offer of settlement during trial, because insured would not assume a part of its own contractual liability."

As to the law of the case, the Court said:

"In our opinion the insurer cannot escape liability by acting upon what it considers to be for its own

interest alone, but it must also appear that it acted in good faith and dealt fairly with the insured. The insurer, as it had a right to do under the policy, assumed exclusive control of the claim against the insured, and took unto itself the power to determine for the insured all questions of liability, settlement, of defense and management before and during the trial, and of appeal after final judgment. We are of the opinion that this relationship imposes upon the insurer the duty, not under the terms of the contract strictly speaking, but because of and flowing from it, to act honestly and in good faith toward the insured."

The plaintiff recovered, and judgment was affirmed on appeal.

FOURTH CIRCUIT: In *American Casualty Co. of Reading, Pa.* v. *Howard et al.* (Fourth Circuit), 187 Fed. (2d) 322, the insurance company issued a liability policy in the amount of $5,000.00 to Elaine Howard covering automobile accidents. Thereafter, Elias Howard, with the permission of Elaine Howard, was driving the automobile, and collided with George Roberts, who died of the injuries thus received. The administrator of Roberts' Estate brought suit against Elias Howard for damages in the sum of $50,000.00. The insurance company defended the action, and made a thorough investigation and examination of all the facts. The attorneys for the Roberts' Estate also made a careful investigation and reached the conclusion that recovery of damages by the administrator was very doubtful. The Roberts' Estate offered to settle for $5,000.00, the amount of the insurance. This offer was declined, and a verdict and judgment was rendered for $7,000.00. The insurance company paid the $5,000.00 and Elias Howard paid the

balance of $2,000.00. Thereafter, Howard brought suit to recover the sum of $2,000.00. The trial court granted judgment for this amount, and the insurance company appealed to the Court of Appeals for the Fourth Circuit, where the case was reversed. There was no element of bad faith in this case. The trial court found and held that the insurance company had acted in good faith. We quote at length from the opinion, as follows:

> "This brings us to the final question in this case—whether American failed in its duty under the policy when it refused an offer of settlement for all liability arising from the accident upon the payment of $5,000.00. We think not.
>
> "It appears that Messrs. Haynsworth & Hanysworth, after a thorough study of the case, arrived at their approval of $4,000.00, as its settlement worth, without regard to the policy limits and with no thought of placing the selfish interests of American above the interests of the assured. In the light of the demands of Mr. Leatherwood, on behalf of Howard, for a complete settlement at the figure of $5,000.00, Haynsworth submitted their entire file (omitting their own opinion and recommendations) to Ben C. Thornton, a lawyer of unquestioned competence and experience. The opinion of Thornton coincided with that of Haynsworth & Hanysworth. At the trial of the instant case, Mr. Stephen Nettles, another competent lawyer, with wide experience in personal injury cases, testified that if he had been handling the case, he would have taken the same position in the settlement negotiations as that taken by Haynsworth & Hanysworth. Pinkney Cain, another competent and experienced lawyer, was present in the court-room, ready to testify as to his opinion of the manner in which the settlement negotiations were conducted. Other members of the bar

of Greenville were on call to give their opinions. Cain was excused and these other lawyers were notified not to appear when the District Judge stated: 'I am not going to handle this case on the basis or condition of whether we have reputable attorneys and whether they acted with reasonable prudence or not.' It is apparent that these lawyers would have corroborated the testimony of Stephens Nettles.

"No countervailing evidence of this type was introduced on behalf of Elias Howard, whose counsel seemed to rely, as did the District Court, on the proposition that the facts and circumstances of the accident which resulted in the death of Roberts in themselves warrant the conclusion that American was negligent in not accepting the settlement of $5,000.00. With that we cannot agree. A fair gauge or standard by which the conduct of Messer. Haynsworth and Haynsworth in the settlement negotiations here involved, can be appraised, prospective as that conduct had to be in contemplation of the possibilities and probabilities of the outcome of the litigation, would seem to be the judgment of other reasonable and competent lawyers who by experience were familiar with local law and local jury verdict in cases similar to the one in question."

It is thus seen that in the above case in the Fourth Circuit, there was no proof and no showing of bad faith. The insurance company introduced proof that it had conducted the litigation in a proper and careful manner, and with good faith. This proof was made by a number of reputable attorneys. No proof of bad faith was even offered, and as stated by the Court: "No countervailing evidence of this type was introduced on behalf of Elias Howard * * *."

From a careful examination of all the cases cited by the petitioner, in its attempt to show that there is a conflict between the decisions of the various circuits, we are unable to see an conflict whatsoever. We believe that there is a unanimity among the various circuits on the question of bad faith; and that the well-recognized law on this subject is well expressed in the case of *American Fidelity & Casualty Co.* v. *G. A. Nichols Co.*, 173 Fed. (2d) 830, in the following language:

> "When a liability insurance company by the terms of its policy obtains from the insured a power, irrevocable during the continuance of its liability under the policy, to determine whether an offer of compromise of a claim shall be accepted or rejected, it creates a fiduciary relationship between it and the insured with the resulting duties that grow out of such relationship. Under policies like those here involved, the insurer and the insured owe to each other the duty to exercise the utmost good faith. While the insurance company, in determining whether to accept or reject an offer of compromise, may give proper consideration to its own interests, it must, in good faith, give at least equal consideration to the interests of the insured and if it fails so to do it acts in bad faith."

Specification IV.

In Specification IV, the petitioner says that its constitutional right to a trial by jury was denied, and relied upon Rule 38. The answer to this specification is that its right to trial by jury was waived under said Rule 38(d), which provides that if a written demand is not made within 10 days after service, this constitutes a waiver of trial by

jury. When this case was filed a jury was waived, and the case proceeded to trial and judgment without any demand for a jury trial. It was not until after the case was remanded from the Tenth Circuit, and at the time the Security was substituted as plaintiff, that the American filed its demand for a jury trial (2 R. 3). No new issue was raised by said substitution. It was the same identical case, with the same identical issues. All of the proceedings relating to the second trial relate back to the original inception of this action.

The reasons for denying this demand for a jury trial, coming at the late date it did, is well stated in the second opinion of the Tenth Circuit (190 Fed. [2d] 234) as follows:

> "Complaint is made that the court denied the demand of American for a jury trial. It is said that in its answer to the complaint as amended and supplemented by the order substituting Security as the party plaintiff, American set up a great number of defenses which involved issues of fact, for instance the question of good faith or bad faith in the rejection of the offer of settlement of the case pending in the state court; and that as between Security and American, the latter was entitled to a jury trial of such issues. Under Rule of Civil Procedure 38, the right of jury trial of an issue is waived unless a demand for it is made not later than ten days after service of the last pleading relating to such issue. American was the defendant in the action from its beginning. The issue of bad faith on its part in rejecting the offer of settlement of the action pending in the state court was squarely joined on the face of the original complaint and the original answer. No demand was made for a jury trial of that issue within ten days after the filing of the answer, and it was fully tried to the court with-

out a jury. The substitution of Security as the party plaintiff did not change in any manner that issue. Neither did it change in any substantial respect any other issue of fact in the case. American had effectively waived its right to a jury trial. And the substitution of Security as the party plaintiff, without injecting into the case any new or different issues of fact, did not create in American a new right to demand a jury trial. Neither did it revive such right. Even though in such circumstances the court had the power in its discretion to grant a jury trial, the denial of the demand of American did not constitute reversible error. *Roth* v. *Hyer*, 5 Cir., 142 F. 2d 227, certiorari denied, 323 U. S. 712, 65 S. Ct. 38, 89 L. Ed. 573."

Above cited case of *Roth* v. *Hyer*, also stated:

"By Rule 38(b) and (d) the right of jury trial of an issue is waived unless a demand for it is made not later than ten days after the service of the last pleading directed to such issue. We do not think the right to make demand is revived by the reversal of a case for a new trial, nor by a belated amendment of pleadings touching the same general issues. We accordingly hold that there was no error on the retrial in refusing the demand for a jury trial."

CONCLUSION

In conclusion, we submit that this litigation has an importance similar to that of most litigation, but that there is nothing in this case which makes it of any peculiar importance which would justify the extraordinary remedy of a Writ of Certiorari. We further submit that this case is not one of first impression, but that the legal principles herein involved are well settled by uniform precedents.

We further submit that there is no conflict between the various Circuits or Courts of Appeal, on the question of good faith. Finally we submit that the American had waived its right to a trial by jury, and that it was therefor not entitled to its belated demand for a jury trial.

We therefore pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Of Counsel:
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September, 1951.

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CLERK

No. 244.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

AMERICAN FIDELITY & CASUALTY COMPANY, INC.,
a Corporation,
Petitioner,

versus

ALL AMERICAN BUS LINES, INC., and SECURITY MUTUAL CASUALTY COMPANY, a Corporation,
Respondents.

MOTION

For Permission to File Brief as Amicus Curiae in Support of Petition for Writ of Certiorari.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Respondents.

MOTION

For Permission to File Brief as Amicus Curiae in Support of Petition for Writ of Certiorari.

The undersigned Members of the Bar of this Court, the consent of attorneys representing the Respondents having been declined, request permission of this Court to file briefs in support of the Petition for Writ of Certiorari of Petitioner and represent and show to the Court:

(1) The legal questions presented are of first impression and are of vital public concern to all casualty

insurance companies and every purchaser of casualty insurance.

(2) There is a conflict between the decisions of the various Circuits.

(3) The undersigned attorneys represent a great number of casualty insurance companies.

(4) Because of a nation wide effect of a decision of the Circuit Court it is important for the Court to have the benefit of the composite views of attorneys residing at various points throughout the United States.

WHEREFORE, the undersigned Members of the Bar of this Court respectfully request permission of this Court to file briefs amicus curiae in support of the petition for Writ of Certiorari.

Respectfully submitted,

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I, Rodman W. Keenon, a Member of the Bar of the Supreme Court of the United States, residing at 602 Bank of Commerce Building, Lexington, Kentucky, desire that my name be signed to the above motion and the brief amicus curiae in event permission is granted to file amicus curiae brief, and authorize the signing of my name both to the above motion and the brief amicus curiae after said documents have been printed and are ready for filing.

.....
RODMAN W. KEENON.